STATE OF MICHIGAN

COURT OF APPEALS

LANCE E. COREY,

Plaintiff-Appellant,

v

DAVENPORT COLLEGE OF BUSINESS,

Defendant-Appellee.

UNPUBLISHED
July 6, 1999

No. 206185
Kent Circuit Court
LC No. 96-011352-NO

Before: Markey, P.J., and Saad and Collins, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's summary disposition order dismissing his premises liability action against defendant pursuant to a slip and fall incident on defendant's premises. We reverse and remand for further proceedings.

Plaintiff was injured on the front steps of Wessell Hall, a dormitory owned by defendant, shortly after midnight on February 4, 1996. Despite taking precautions in light of the ice and snow he saw on the steps, plaintiff slipped and fell face forward hitting the cement at the base of the front door. He suffered a fractured nose, deviated septum and a forehead laceration. Plaintiff premised his negligence action against defendant in part on defendant's failure to warn and failure to maintain the property in a safe and reasonable manner. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10) alleging that plaintiff admitted the ice and snow on the steps were open and obvious and that defendant had no duty to warn of open and obvious conditions. Plaintiff countered by arguing that the front steps were unlighted, lacked a handrail as required by BOCA and the Grand Rapids City Code, and constituted an unreasonably dangerous condition that did not relieve defendant of its duty to warn.

The trial court granted defendant's motion upon finding that plaintiff admitted he noted the snow and ice on the steps before he attempted to climb them and that plaintiff knew there was an alternate entrance at the rear of the building. Thus, the court concluded that the hazard was open and obvious, and defendant had no duty to warn. The court also ruled that, assuming that defendant violated the building code by not installing a hand railing outside the dorm, plaintiff presented no evidence to connect the code violation to the injury.

I

Plaintiff asserts that the trial court erred in finding that the icy steps were open and obvious thereby precluding any recovery from defendant.[1] Upon de novo review, we agree. See *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996).

To determine whether a record could be developed that would leave open an issue on which reasonable minds might differ as required by MCR 2.116(C)(10), we must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence in favor of the nonmoving party and grant the benefit of any reasonable doubt to the opposing party. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994); *Michigan Mutual Ins Co v Dowell*, 204 Mich App 81, 85-86; 514 NW2d 185 (1994). The opposing party may not rest upon mere allegations or denials in the pleadings but must, by affidavit or other documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4). The trial court may not make factual findings or weigh credibility in deciding a motion for summary disposition. *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 357; 486 NW2d 361 (1992). Here, we find that genuine issues of material fact exist regarding whether defendant exercised reasonable care in addressing the accumulated snow and ice on the front steps of plaintiff's dormitory.

Premises liability cases are typically premised upon the following three theories: failure to warn, negligent maintenance/failure to maintain, or defective physical structure. *Millikin v Walton Manor Mobile Home Park, Inc*, ___ Mich App ___; ___ NW2d ___ (Docket No. 207051, issued 3/19/99), slip op at 3. As a general rule, the business invitor has a duty to exercise reasonable care to protect his invitees from dangerous conditions on his land and to exercise ordinary care to keep the premises safe. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609-612; 537 NW2d 185 (1995); *Schuster v Sallay*, 181 Mich App 558, 565; 450 NW2d 81 (1989). This duty includes the duty to inspect for hidden dangers and warn of concealed dangerous conditions of which the owner is aware or should be aware. An invitor must warn of hidden defects but is not required to eliminate or warn of open and obvious dangers unless he should anticipate the harm despite the invitee's knowledge of it. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 90-95; 485 NW2d 676 (1992); *Millikin, supra* slip op p 4; *Hughes v PMG Building, Inc*, 227 Mich App 1, 10-11; 574 NW2d 691 (1997). Whether a danger is open and obvious depends upon whether it is reasonable to expect an average user with ordinary intelligence to discover the danger upon casual inspection. *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 263-264; 532 NW2d 882 (1995). Regardless of a duty to warn, an invitor still has a duty to protect against foreseeably dangerous conditions. *Bertrand, supra* at 611.

Where the dangers are known to the invitee or are so obvious that he could reasonably be expected to discover them,[2] the premises owner owes no duty to the invitee unless the risk of harm remains unreasonable despite its obviousness or the invitee's knowledge of it. *Bertrand, supra; Riddle, supra* at 94-96, citing 2 Restatement Torts, 2d §343A(1). It is not true that a premises owner is relieved of liability as a matter of law merely because the invitee discovered the danger and tried to protect himself against it. "Rather, the question is whether [the invitor] can reasonably expect invitees to

protect themselves against the hazard." *Perry v Hazel Park Raceway*, 123 Mich App 542, 549-550; 332 NW2d 601 (1983). Accordingly, with respect to protecting invitees against foreseeably dangerous conditions, our Supreme Court in *Bertrand, supra* at 611 concluded that:

> [T]he rule generated is that if the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger. *If the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions.* ***The issue then becomes the standard of care and is for the jury to decide***. [Emphasis in original and added.]

This is consistent with our Supreme Court's pronouncement in *Quinlivan v Great Atlantic & Pacific Tea Co*, 395 Mich 244, 261; 235 NW2d 732 (1975), with respect to an invitor's responsibility regarding snow and ice hazards that are visible to its invitees:

> [W]e reject the prominently cited notion that ice and snow hazards are obvious to all and therefore may not give rise to liability. While the invitor is not an absolute insurer of the safety of the invitee, the invitor has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation. . . . As such duty pertains to ice and snow accumulations, it will require that reasonable measures be taken within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee.

Thus, even if the dangers of ice and snow on driveways, steps, and parking lots are open and obvious,

> [c]ases finding that the risk of harm is unreasonable despite its obviousness or despite the invitee's awareness of the condition are rare and typically involve hazardous natural conditions such as accumulations of snow and ice or excessive mud. The risk to the invitee in such conditions has been held to be somehow more unavoidable than other conditions, thereby creating an exception to the open and obvious defense. [*Bertrand, supra* at 625-626 (Weaver, J., concurring in part and dissenting in part).]

In answering whether a property owner can reasonably expect invitees to protect themselves against the hazard, this Court in *Perry, supra* at 549, adopted the following standard from Prosser on Torts:

> "[W]here the condition is one such as icy steps, which cannot be negotiated with reasonable safety even though the invitee is fully aware of it, and, because the premises are held open to him for his use, it is to be expected that he will nevertheless proceed to encounter it. In all such cases, the jury may be permitted to find that obviousness, warning or even knowledge is not enough." (Footnote omitted.) Prosser, Torts (4th ed.), S 61, pp. 394- 395.

> This is not a case like *Jones v. Michigan Racing Ass'n,* 346 Mich 648; 78 NW2d 566 (1956), where the hazard to be avoided was a puddle that the plaintiff could have avoided by walking around it. This case is analogous to the "icy steps" cases. Mr. Perry should not be charged with negligence for attempting to safely negotiate an unavoidable hazard.

In light of the foregoing, we submit that the issue at the heart of this analysis is whether the invitor exercised reasonable care in light of the circumstances, i.e., the ice and snow accumulation, at hand. In light of the documentary evidence presented to the trial court, taken in a light most favorable to plaintiff, we believe that a record might be developed that would leave open a material issue upon which reasonable minds might differ. *Singerman v Municipal Services Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997).

Defendant's own answers to plaintiff's interrogatories revealed that it did nothing to address the snow and ice allegedly existing on the dormitory steps on February 3-5. Plaintiff could produce evidence at trial that would lead reasonable minds to conclude that defendant acted unreasonably in failing to remove snow and ice that had accumulated a few days before plaintiff's accident. Moreover, the determination of reasonableness is one for the fact finder, *Bertrand, supra* at 611. Consequently, we find that because a genuine issue of material fact exists, summary disposition is inappropriate, and we reverse the trial court's orders in favor of defendant.[3]

II

Also, even though the trial court apparently addressed only one of plaintiff's negligence theories, plaintiff properly pleaded and should be entitled to argue to the jury that defendant failed to maintain the steps in a reasonably safe fashion. Whether the plaintiff has argued the defendant's failure to warn or failure to maintain, the same considerations involving the open and obvious defense come into play regarding accumulated snow and ice. See *Quinlivan, supra* at 260-261. Indeed, given the open and obvious nature of ice and snow, it is reasonable to expect that plaintiff's proofs will focus on defendant's duty to maintain the steps in a reasonably safe condition free of ice and snow. Cf. *Zeglowski v Polish Army Veterans Ass'n of Michigan, Inc*, 363 Mich 583, 586; 110 NW2d 578 (1961) (testimony failed to identify any hazardous condition that subjected plaintiff to an "unreasonable risk" of harm and that caused his injury when he exited the defendant's hall. The plaintiff's fall was, therefore, merely an unfortunate accident.).

III

Regarding the trial court's reliance on the existence of an "alternate route" into the dormitory, we believe that the trial court erred in concluding that this route relieved defendant of liability as a matter of law. According to the trial court, plaintiff "acknowledges that there was available to him and known to be available to him an easily accessible alternative. Accordingly, by his own testimony, the cases of Riddle, Bertrand, and Navotny clearly control here." We find nothing in these three cases that would require summary disposition of plaintiff's negligence claims merely because there was another entrance without steps leading into the dormitory. If anything, this alternate route defense would only be relevant

with respect to plaintiff's comparative negligence.[4] If proven at trial, it would not relieve defendant of liability for its negligence.

Moreover, defendant has failed to present support for the proposition that plaintiff had an affirmative obligation to find another safer method of entering the building *other than* the front door.[5] Cf. *Zeglowski, supra*. Accordingly, we find that the trial court erred in granting summary disposition on the basis of the alternate entrance.

IV

Finally, with respect to the trial court's dismissal of plaintiff's building code violation allegations, we also find that genuine issues of material fact exist, and summary disposition was improper. The trial court dismissed this claim because it found that plaintiff could not establish proximate causation between the absence of a hand rail and plaintiff's fall, particularly in light of the open and obvious nature of the snow accumulated on the dorm's front steps:

> Assuming, for the sake of argument, that there was a violation of the city code with regard to the construction or availability of a handrail or something comparable, the fact remains there is absolutely no basis on this record to connect that code violation to what happened here. Therefore, assuming there's a code violation, there isn't the requisite causal connection. That case, Skinner v Square D controls. The case is dismissed.

We believe that *Beals v Walker*, 416 Mich 469, 480-482; 331 NW2d 700 (1982), a slip and fall case, is more directly on point than *Skinner*, a product liability case. In *Beals, supra*, our Supreme Court determined that evidence "tending to show the violation of two safety regulations issued by the Michigan Department of Labor" justified the trial court's decision not to grant a directed verdict in favor of the defendant in a slip and fall case where the plaintiff fell off an icy roof. Our Supreme Court held that:

> Violations of administrative rules and regulations are evidence of negligence. *Douglas v. Edgewater Park Co*., 369 Mich 320, 328; 119 NW2d 567 (1963); see also *Zeni v. Anderson*, 397 Mich 117, 142; 243 NW2d 270 (1976). The Court of Appeals majority found that the alleged violation of safety regulations was irrelevant and should not have been admitted. We disagree. As to the regulations requiring the use of guardrails and barriers on "runways", there was evidence sufficient to support the inference that the roof was used as a "passageway for persons elevated above the surrounding floor or ground level". Of course, should the *jury* conclude that the roof was so rarely used that it was not a "passageway", or "runway", then it will properly conclude that the regulation was not violated. A similar factual dispute exists regarding the regulation requiring a platform at the base of a ladder ascending over 20 feet. Whether or not the platform would have prevented the plaintiff's fall or provided a means by which the plaintiff could have stopped his fall is a *question of fact for the jury*, since it appears that while the plaintiff never actually reached the ladder, he may

> have slipped down the angled roof over the area on which a horizontal platform should have been constructed. However, before the regulation is admitted upon retrial, the trial judge must carefully consider whether the harm suffered was what the regulation was designed to prevent. *Zeni, supra* [at] 138. [*Beals, supra* at 481-482 (emphasis added).]

Although plaintiff apparently presented only copies of the Grand Rapids City Building Code and the BOCA national building code to establish that a handrail should have been installed on the stairs in support of its claims, we believe that a record could be developed that would leave open an issue on which reasonable minds might differ. Defendant has not presented evidence regarding any "grandfathering" of this dormitory under these building codes, although it insinuates in its brief this possibility. We also believe that the existence of the snow, although open and obvious, would lead reasonable minds to differ regarding the relationship between plaintiff's fall and the absence of a handrail. In other words, it is logical to conclude that when plaintiff saw the ice and snow on the steps, he would be likely to reach for a handrail if one were present to help him negotiate the steps safely. Again, however, this is a question for the jury to decide. *Beals, supra*.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Jeffrey G. Collins

[1] Here, the trial court found that "[i]n his deposition, to which testimony Mr. Corey is bound, he acknowledged appreciating that the stairway was, because of weather conditions, slippery. And he further acknowledges that there was available to him and known to be available to him an easily accessible alternative."

[2] This "open and obvious" defense "applies both to claims that a defendant failed to warn about a dangerous condition and to claims that the defendant breached a duty in allowing the dangerous condition to exist in the first place." *Millikin, supra*.

[3] We did not consider those portions of deposition transcripts or other documentary evidence that the parties provided to this Court but failed to present to the trial court.

[4] The opinion in *Nemecek v Knights of Columbus*, an unpublished opinion per curiam of the Court of Appeals, Docket No. 191378, issued 6/27/97, that defendant relies upon for this "alternate entrance" defense, provides neither precedential value nor factual similarity for the case at bar. In *Nemecek*, *supra*, the plaintiff fell while negotiating an entrance to the defendant's building despite the fact that the entrance was covered with over one foot of snow. Importantly, the main entrance to the defendant's building was cleared of snow on the date of the accident, and the defendant established that the entrance where the fall occurred was not ordinarily maintained in the winter. We have no way of

knowing how *Nemecek* would have been decided had the fall occurred at the main, unshoveled entrance into the defendant's building. Consequently, we do not consider *Nemecek* as persuasive to the case at bar.

[5] Moreover, nothing in the evidence established that the back entrance to the dorm was cleared of ice and snow and safe to use at the time of plaintiff's fall.